

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

FILED

JAN 23 2009

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:

BRYON GEORGE VAN NESS,

Debtor.

Case No. 08-37853

DC No. RDN-1

OPINION
REGARDING MOTION FOR RELIEF FROM AUTOMATIC STAY

Randall D. Naiman, Naiman Law Group, PC, San Diego, California
for Deutsche Bank National Trust Company.

1 KLEIN, Bankruptcy Judge:

2
3 The problem is how to deal with motions for relief from
4 automatic stay that also seek relief available only by adversary
5 proceeding. The practice of adding to stay relief motions
6 procedurally incorrect requests for injunctions or extraordinary
7 equitable relief has become a nuisance. This opinion points out
8 that - in addition to denying the motion or merely rejecting the
9 inappropriate relief - another arrow in the court's quiver is to
10 accept procedurally incorrect requests at face value by deeming
11 the motion to be a complaint commencing an adversary proceeding
12 and requiring payment of the adversary proceeding filing fee.

13 Here, the movant seeks extraordinary "in rem" relief not
14 authorized by 11 U.S.C. § 362(d), including a ban on filing
15 future bankruptcy cases by other persons, a ban on automatic
16 stays in future cases, and an order providing for the sheriff to
17 conduct an eviction notwithstanding a future bankruptcy case.

18 As injunctive and extraordinary equitable relief requires an
19 adversary proceeding, the present motion for relief from stay is
20 deemed to be a complaint commencing an adversary proceeding. The
21 movant must pay the \$100 balance of the \$250 adversary proceeding
22 filing fee. The movant's election to combine injunctive relief
23 with stay relief operates to waive the automatic termination
24 provision of § 362(e). A scheduling order shall issue.

FACTS

The effort of Deutsche Bank National Trust Company to obtain possession of the debtor's residence on Quiver Drive in Ione, California, through unlawful detainer proceedings attendant to foreclosure was stayed by operation of § 362(a) when the debtor filed his chapter 7 case.

Deutsche Bank's ensuing motion for relief from stay under § 362(d), which was styled a "Motion For In Rem Relief," included requests for additional relief that, as will be explained, are not provided for by § 362:

- "That the order shall further preclude any subsequent filing of a bankruptcy case, in any chapter proceeding, for 180 days by Debtor, and/or any transferees, and/or any other persons or entities in possession of the Property, so as to affect DEUTSCHE BANK'[s] right to retake possession of the Property, and should a subsequent filing of a bankruptcy case be made by the Debtor, and/or any transferees, and/or any other persons or entities in possession of the Property, the automatic stay of Title 11 U.S.C. section 362 et. seq. shall not apply to the Property commonly known as 2543 Quiver Drive, Ione, CA 95640." Motion, at 4.
- "That the order is binding and effective in any bankruptcy case, pending or future, no matter who the debtor(s) may be without further notice." Motion, at 4-5.
- "The Sheriff may evict the Debtor and any other occupants from the Property regardless of any future bankruptcy filing concerning the Property for a period of 180 days from the hearing of this Stay Motion without further notice." Motion, at 5.

The stated bases for the motion were: "(a) cause; (b) inadequate protection; and (c) lack of equity." Motion, at 2.

ISSUES

1. Whether Rule 9014 permits requests for injunctive relief to be included in a stay relief motion.
2. Whether to exercise discretion to deem a Rule 9014 motion to be a complaint commencing an adversary proceeding per Rule 7001 when relief requested requires an adversary proceeding.

DISCUSSION

The analysis begins with the parameters of relief from stay under § 362(d) and proceeds to consideration of the procedure to be followed when the relief sought exceeds those parameters. On both counts, the assessment of motions seeking "in rem" relief is controlled by, and is the logical extension of, Johnson v. TRE Holdings LLC (In re Johnson), 346 B.R. 190 (9th Cir. BAP 2006), in which such relief was held to be ineffective to preempt the automatic stay in a subsequent case.

I

The initial question is whether the extraordinary relief that Deutsche Bank styles as "in rem" relief is a form of relief that is authorized by § 362.

A

Two fundamental aspects of the bankruptcy automatic stay are implicated in this situation.

First, the filing of a bankruptcy petition operates as a

1 stay of the activities described in § 362(a), subject to the
2 exceptions stated in § 362(b). 11 U.S.C. §§ 362(a)-(b); Johnson,
3 346 B.R. at 193-94. In other words, unless there is an exception
4 within § 362 itself, the stay goes into effect upon filing
5 regardless of whether a previous court has said that a stay will
6 not go into effect. Johnson, 346 B.R. at 193-94. As we shall
7 see, the stay exception in § 362(b)(21)(B) for orders barring a
8 debtor from filing another case is narrow and presupposes that
9 the predicate order was procedurally correct, which is precisely
10 the subject of this opinion. 11 U.S.C. § 362(b)(21)(B).

11 Second, the court's authority to adjust the automatic stay
12 is constrained by § 362(d), which delineates four bases for the
13 court to "grant relief from the stay ..., such as by terminating,
14 annulling, modifying, or conditioning such stay." 11 U.S.C.
15 § 362(d). Those four bases are: cause, § 362(d)(1); lack of
16 equity in property not needed for an effective reorganization,
17 § 362(d)(2); failure timely to file a plan of reorganization or
18 commence monthly payments in a single asset real estate case,
19 § 362(d)(3); and certain instances of the filing of a petition as
20 part of a "scheme to delay, hinder, and defraud" creditors
21 secured by interests in real property, § 362(d)(4).

22 The grounds asserted by Deutsche Bank in its motion are:
23 "(a) cause; (b) inadequate protection; and (c) lack of equity."
24 The first two invoke § 362(d)(1). The third invokes § 362(d)(2).
25 No other § 362 basis is asserted for stay relief or for the "in
26 rem" provisions that are requested by Deutsche Bank.

B

It is significant that Deutsche Bank does not invoke § 362(d)(4), which does provide a limited form of relief that is in the nature of "in rem" relief in the sense that it provides a means for a stay relief order to be binding in another case.

As enacted in 2005, the new § 362(d)(4) provides that, in addition to adjusting the § 362(a) injunction, an order may be binding in another bankruptcy case under the following process:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay

— ...
(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either —

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

11 U.S.C. § 362(d)(4) (2006).

There are two key requirements for the § 362(d)(4) version of "in rem" relief. First, the court must make a determination that the filing of the petition was "part of a scheme to delay,

1 hinder, and defraud creditors" in either (or both) of the
2 designated circumstances.

3 Second, the bankruptcy court's order determining that the
4 filing of the petition was part of a scheme to delay, hinder, and
5 defraud creditors in requisite circumstances must be recorded.

6 What follows from recording the order, as a matter of law,
7 is that the bankruptcy court's order will be effective for cases
8 purporting to affect the same real property that are filed up to
9 two years after entry of the order. 11 U.S.C. § 362(d)(4).

10 A parallel exception to stay provided by § 362(b)(20) helps
11 implement § 362(d)(4). Even so, Congress stipulated in both
12 subsections that the debtor in a subsequent case is entitled to
13 obtain relief from that order upon demonstrating changed
14 circumstances or good cause. 11 U.S.C. §§ 362(b)(20) & (d)(4);
15 Johnson, 346 B.R. at 196-97; 3 COLLIER ON BANKRUPTCY
16 ¶¶ 362.05[19][a] & 362.07[6] (Henry J. Sommer & Alan N. Resnick
17 eds. 15th ed. rev. 2006).

18 Deutsche Bank does not allege that the debtor filed the
19 chapter 7 case as part of a scheme to delay, hinder, and defraud
20 creditors. Nor would any of its proposed "in rem" provisions be
21 subject to the opportunity for the debtor to obtain relief from
22 the order by showing changed circumstances or other cause.
23 Hence, the "in rem" provisions of the relief it seeks are
24 inconsistent with, and not grounded upon, § 362.

C

Since Deutsche Bank's requested "in rem" provisions are not contemplated by § 362, the question becomes a quest for the authority for the requested relief as to which 11 U.S.C. § 105 does not provide a satisfying answer.

For the reasons explained in Johnson, the automatic stay relief determination is merely an adjustment of a statutory injunction in which the court does not definitively determine interests in property. Johnson, 346 B.R. at 195.

Nor, as also explained in Johnson, does 11 U.S.C. § 105 authorize "in rem" stay relief. It is settled that § 105 is not a roving commission to do equity or to do anything not consistent with the Bankruptcy Code. Johnson, 346 B.R. at 195-96; accord, Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988); Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1190 (9th Cir. 2003); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507 (9th Cir. 2002); Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, 1402 (9th Cir. 1995); Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.), 885 F.2d 621, 624-26 (9th Cir. 1989); Bear v. CoBen (In re Golden Plan of Cal., Inc.), 829 F.2d 705, 713 (9th Cir. 1986); Yadidi v. Herzlich (In re Yadidi), 274 B.R. 843, 848 (9th Cir. BAP 2002).

In short, there does not appear to be direct statutory authority for an order that bans the filing of future bankruptcy cases by other persons, bans automatic stays in future cases, and authorizes the sheriff to ignore a future bankruptcy case when

1 conducting an eviction.

2 The extraordinary "in rem" relief that Deutsche Bank seeks
3 is focused upon the Quiver Lane property. Since the relief would
4 be effective against other persons or entities in possession of
5 the property, it affects an interest in real property and somehow
6 must be attached to the property.

7 The absence of direct statutory authority for the proposed
8 relief does not necessarily mean that the proposed relief could
9 not be awarded. Rather, for purposes of analysis and assuming
10 without deciding that the relief would be appropriate, it could
11 be based on principles of general equity jurisdiction. The
12 exercise, however, of such jurisdiction is serious business that
13 requires careful balancing of interests as the court exercises
14 its discretion. See, e.g., Weinberger v. Romero-Barcelo, 456
15 U.S. 305, 311-13 (1982) (basic injunction principles restated);
16 c.f., Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.,
17 367 F.3d 1108, 1111 (9th Cir. 2004) (preliminary injunction);
18 Miller v. Cal. Pac. Med. Ctr., 19 F.3d 449, 456 (9th Cir. 1994)
19 (same). As noted, such relief must also be consistent with the
20 Bankruptcy Code because general equitable power, to the extent it
21 may be more expansive than § 105, is no more of a roving
22 commission than is § 105.

23 The relief that Deutsche Bank seeks that goes beyond what is
24 contemplated by § 362 would be permissible, if at all (no view is
25 being expressed regarding the ultimate merits), as an exercise of
26 basic equity jurisdiction.

1 Any such order would amount to extraordinary relief based on
2 general equitable authority. When extraordinary relief in the
3 form of an injunction or other equity-based order not directly
4 authorized by the Bankruptcy Code is under consideration, the
5 affected parties are entitled to all the process that is due.

6
7 II

8 Next come the rules of procedure. Rule 7001 mandates that
9 an injunction or other equitable relief be obtained by way of
10 adversary proceeding or plan confirmation, rather than by way of
11 a "contested matter" motion. Fed. R. Bankr. P. 7001(7).

12
13 A

14 An adversary proceeding under Federal Rule of Bankruptcy
15 Procedure 7001 is essentially indistinguishable from a civil
16 action under the Federal Rules of Civil Procedure. See
17 Christopher Klein, Bankruptcy Rules Made Easy (2001): A Guide to
18 the Federal Rules of Civil Procedure that Apply in Bankruptcy, 75
19 AM. BANKR. L.J. 35, 38 (Winter 2001).

20 In contrast, a contested matter under Federal Rule of
21 Bankruptcy Procedure 9014 is a motion procedure susceptible of
22 more expeditious resolution than an adversary proceeding. In
23 particular, the pleading rules that entail complaint, answer,
24 counterclaim, crossclaim, and third-party practice are dispensed
25 with in favor of a simple motion procedure. Johnson, 346 B.R. at
26 195; Khachikyan v. Hahn (In re Khachikyan), 335 B.R. 121, 125-26

1 (9th Cir. BAP 2005); GMAC Mortgage Corp. v. Salisbury (In re
2 Loloee), 241 B.R. 655, 660 (9th Cir. BAP 1999); United States v.
3 Valley Nat'l Bank (In re Decker), 199 B.R. 684, 690 (9th Cir. BAP
4 1996) (concurring op.); Klein, 75 AM. BANKR. L.J. at 40-41.

5 A motion for relief from the § 362 automatic stay is a Rule
6 9014 contested matter. Fed. R. Bankr. P. 4001(a)(1).

7 It is settled that a Rule 9014 motion cannot be used to
8 circumvent the requirement of an adversary proceeding. Golden
9 Plan, 829 F.2d at 711-12; Loloee, 241 B.R. at 660-62.

10 The only "in rem" order that is available through a motion
11 for stay relief is that provided by § 362(d)(4), which does not
12 entail an injunction. Congress narrowly circumscribed that
13 procedure in a fashion tailored to a balance of creditor and
14 debtor rights. Deutsche Bank does not allege a "scheme to delay,
15 hinder, and defraud creditors" in qualifying circumstances and
16 does not otherwise invoke § 362(d)(4).

17
18 B

19 The forms of relief that Deutsche Bank seeks are
20 unambiguously requests for the court to exercise its general
21 equity jurisdiction to order an injunction or other equitable
22 relief affecting an interest in property. An adversary
23 proceeding is required in order to obtain such relief. Fed. R.
24 Bankr. P. 7001(2) & (7).

The requested order prohibiting for 180 days the subsequent filing of a bankruptcy case by the debtor or by other persons to whom the subject property may be transferred is in the nature of an injunction not specifically authorized by the Bankruptcy Code.

To be sure, orders made on motion under two Bankruptcy Code provisions can operate to bar certain future filings, but both instances are associated with orders dismissing a pending case.

First, Bankruptcy Code § 109(g) renders an individual debtor or family farmer ineligible to be a debtor for 180 days if either of two conditions are satisfied. 11 U.S.C. § 109(g). The first arises if the court dismisses the case "for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case." 11 U.S.C. § 109(g)(1). The second arises if the debtor seeks, and receives, a voluntary dismissal of the case after a creditor has made a motion for relief from stay. 11 U.S.C. § 109(g)(2).

Neither of the § 109(g) alternatives contemplates a direct order by the court to the debtor prohibiting a filing. Rather, the 180-day ineligibility follows as a matter of law either from an order dismissing the case that recites one of the § 109(g)(1) conditions or by reference in a later case to the docket of the prior case to establish the § 109(g)(2) timing sequence of voluntary dismissal following stay relief motion. Thus, no order directly prohibiting another filing within 180 days is needed.

Moreover, § 109(g) does not extend to the persons or

1 entities other than the debtor that Deutsche Bank wants barred.

2 Second, the court has discretion under Bankruptcy Code
3 § 349(a) to preclude future filings. 11 U.S.C. § 349(a). That
4 section provides, "[u]nless the court, for cause, orders
5 otherwise," dismissal of a bankruptcy case is without prejudice
6 to future filings. See Leavitt v. Soto (In re Leavitt), 171 F.3d
7 1219, 1223 (9th Cir. 1999) (§ 349(a) authorizes a bankruptcy
8 court to dismiss a case with prejudice). The requisite § 349(a)
9 "cause" for entering a dismissal with prejudice, which is not
10 further defined in the Bankruptcy Code, is governed in the Ninth
11 Circuit by "the totality of the circumstances," including whether
12 the debtor made misrepresentations, the debtor's history of
13 filings and dismissals, whether the debtor only intended to
14 defeat state court litigation, and whether egregious behavior is
15 present. Id., at 1224.

16 Neither § 109(g) nor § 349(a) applies here because no
17 dismissal of the case is involved. Deutsche Bank has not moved
18 to have the case dismissed, much less dismissed with prejudice.
19 Nor, in any event, do those provisions support prohibiting third
20 persons from filing bankruptcy cases.

21 Since the 180-day filing prohibition sought by Deutsche Bank
22 is not associated with a dismissal and is not grounded on
23 specific provisions of the Bankruptcy Code, the authority to
24 issue a stay relief order prohibiting the debtor and third
25 parties from filing a bankruptcy case affecting the subject
26 property must turn on the court's general equity jurisdiction
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28

1 discussed above. An adversary proceeding is required. Golden
2 Plan, 829 F.2d at 711-12; Johnson, 346 B.R. at 195; Loloee, 241
3 B.R. at 660-62.

4 Bankruptcy Code § 362(d)(21)(B) does not compel a contrary
5 result. 11 U.S.C. § 362(d)(21)(B). The stay exception created
6 by that provision is limited to a debtor in a prior case and
7 applies only if a 180-day prohibition was ordered in a prior
8 bankruptcy case, which would be a straightforward enforcement of
9 a provision in a dismissal order issued under § 349(a). It does
10 not apply to prohibitions addressed to third parties. Moreover,
11 it presupposes that the order in the prior case was procedurally
12 correct but does not dictate the appropriate procedure for having
13 obtained such an order, which could have been a contested matter
14 in the case of a § 349(a) order or an adversary proceeding in the
15 case of an injunction issued under general equity jurisdiction.

16 In this instance, the particular 180-day filing prohibition
17 that is requested requires an adversary proceeding.

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19 2

20 Deutsche Bank also seeks an order to the effect that stay
21 relief granted on the instant motion be "binding and effective in
22 any bankruptcy case, pending or future, no matter who the
23 debtor(s) may be without further notice." Upon scrutiny, this
24 request is not grounded upon a Bankruptcy Code provision and is
25 of doubtful validity.

26 Of course, as to third parties, there is a basic due process
27
28

1 problem that virtually compels the more formal process of an
2 adversary proceeding. Mullane v. Cent. Hanover Bank & Tr. Co.,
3 339 U.S. 306, 314-15 (1950).

4 A fundamental statutory problem with Deutsche Bank's request
5 is that the court is being asked to trump the application of
6 § 362(a) in a future case in a manner that appears to contradict
7 that section. The key portion of § 362(a) provides that the
8 filing of a case "operates as a stay, applicable to all
9 entities," of acts against the debtor or property of the estate
10 "[e]xcept as provided in subsection (b) of this section."
11 Deutsche Bank apparently wants this court to forge an additional
12 qualifier to § 362(a) ("unless some prior judge said otherwise"),
13 which cannot be done.

14 To be sure, § 362(b) does provide two stay exceptions that
15 might become applicable. Neither, however, contemplates an order
16 by this court directing that the § 362(a) stay not apply.

17 First, if Deutsche Bank were to go through the steps
18 necessary to obtain stay relief under § 362(d)(4) in this case,
19 then § 362(b)(20) automatically provides a stay exception that
20 would apply to the debtor in a subsequent case for two years
21 unless that debtor were to demonstrate changed circumstances or
22 other good cause. 11 U.S.C. § 362(b)(20). Since Deutsche Bank
23 does not seek § 362(d)(4) relief, the § 362(b)(20) stay exception
24 cannot apply in a future case.

25 Second, § 362(b)(21) provides a stay exception that would
26 apply in a future case if the debtor is ineligible to be a debtor
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1 by virtue of § 109(g) or if this court prohibits the debtor in
2 this case from being a debtor in a later case. 11 U.S.C.
3 § 362(b)(21). The difficulty here is that, since there is no
4 present prospect of a dismissal that would trigger either
5 § 109(g) ineligibility or an opportunity to "order otherwise"
6 under § 349(a) with respect to prejudice attendant to dismissal,
7 the only procedural avenue for this court to issue an order
8 prohibiting the debtor from filing another bankruptcy case is an
9 adversary proceeding. Similarly, since § 362(b)(21) does not
10 apply to third parties, an adversary proceeding is also required
11 on that account.

12 In addition, Bankruptcy Code § 362(c)(4)(A)(i) provides that
13 the stay will not go into effect if an individual debtor was the
14 subject of two or more cases (other than one refiled under 11
15 U.S.C. § 707(b)) pending within the prior year. 11 U.S.C.
16 § 362(c)(4)(A)(i). As with § 362(b)(20) and § 362(d)(4),
17 Congress included an elaborate mechanism for reimposing the stay
18 upon a showing of good faith. 11 U.S.C. § 362(c)(4)(B)-(D). The
19 application of this provision in a future case does not depend
20 upon this court having issued any order directly addressing the
21 stay in future cases.

22 Thus, this motion is not an appropriate vehicle for
23 obtaining this aspect of the relief Deutsche Bank requests.

Deutsche Bank's final request is for an order permitting the sheriff to "evict the Debtor and any other occupants from the Property[,] regardless of any future bankruptcy filing concerning the Property[,] for a period of 180 days from the hearing of this Stay Motion without further notice."

A host of difficulties arise. No Bankruptcy Code provision authorizes such an order. Moreover, the order apparently would preempt state law eviction process and state law defenses.

The motion papers make clear that Deutsche Bank has not yet completed the unlawful detainer process. It has not removed its action from state court and is not asking this court to conduct an unlawful detainer proceeding. Without a judgment of unlawful detainer and a valid writ of possession, Deutsche Bank cannot enlist the sheriff's assistance in evicting the debtor, regardless of the existence or status of any bankruptcy case. See CAL. CIV. PROC. CODE §§ 1174, 712.010, 712.030.

The portion of the requested relief that does not purport to trump § 362(a) in future bankruptcy cases is tantamount to asking the bankruptcy court to complete a California unlawful detainer proceeding that had been commenced but not concluded when the bankruptcy case was filed.

While the bankruptcy jurisdiction arguably is sufficiently broad so as to permit it to entertain an unlawful detainer, such a proceeding would necessarily be a proceeding to determine the validity of an interest in property and to recover the property

1 that must, per Rules 7001(1) and (2), be pursued by adversary
2 proceeding. Fed. R. Bankr. P. 7001(1) & (2).

3 As a practical matter, there is also an abstention barrier
4 to unlawful detainer actions in bankruptcy court. Since the
5 unlawful detainer was pending in state court when the bankruptcy
6 case was filed and presumably can be timely adjudicated,
7 mandatory abstention under 28 U.S.C. § 1334(c)(2) could force
8 Deutsche Bank back to state court. In any event, Deutsche Bank
9 should expect that a bankruptcy court would dispose of an
10 unlawful detainer action by exercising its discretion "in the
11 interest of comity with State courts or respect for State law" to
12 invoke permissive abstention under 28 U.S.C. § 1334(c)(1).

13 In short, no portion of the relief sought in this request is
14 eligible to be awarded as part of a motion for relief from stay.
15 An adversary proceeding is required.

16
17 4

18 Deutsche Bank does include in its motion some relief that is
19 appropriate to grant in a stay relief motion.

20 It wants relief to proceed with its remedies under
21 nonbankruptcy law to recover possession of the property. This is
22 a legitimate, garden-variety stay relief request.

23 It also requests that the court waive the ten-day stay under
24 Federal Rule of Bankruptcy Procedure 4001(a)(3) of its order
25 granting relief from stay. Since that rule provides that an
26 order granting relief from stay does not become effective until
27

1 ten days after the date of entry "unless the court orders
2 otherwise," the natural time and place for the court to "order
3 otherwise" is in the relief order itself.

4 Deutsche Bank's request for an order stating that the
5 court's termination of the automatic stay will be binding despite
6 conversion of the case to another chapter unless a specific
7 exception is provided by the Bankruptcy Code is a common, albeit
8 silly, request in a stay relief motion and does not require an
9 adversary proceeding. Settled bankruptcy law recognizes that the
10 order remains effective in such circumstances. See, e.g., Aloyan
11 v. Campos (In re Campos), 128 B.R. 790, 791-92 (Bankr. C.D. Cal.
12 1991); In re Greetis, 98 B.R. 509, 513 (Bankr. S.D. Cal. 1989).
13 Hence, the proposed provision is merely declarative of existing
14 law and is not appropriate to include in a stay relief order.

15 Indeed, requests for including in orders provisions that are
16 declarative of existing law are not innocuous. First, the mere
17 fact that counsel finds it necessary to ask for such a ruling
18 fosters the misimpression that the law is other than it is.
19 Moreover, one who routinely makes such unnecessary requests may
20 eventually have to deal with an opponent who uses the fact of
21 one's pattern of making such requests as that lawyer's concession
22 that the law is not as it is.

23 As pertinent to the present analysis, however, including in
24 a stay relief motion a request for a statement declarative of
25 existing law, even though useless and unlikely to be adopted,
26 does not require an adversary proceeding.

C

A final procedural point is important. The relation between Rules 7001 and 9014 is not a two-way street. While it is not permissible to seek Rule 7001 adversary proceeding relief as part of a Rule 9014 contested matter, the converse is not true. There is no impediment to including a contested matter issue in an adversary proceeding.

If, however, a party in interest presents a request for relief from automatic stay as part of an adversary proceeding, then that party necessarily waives the deadlines created by § 362(e) for determination of the stay relief question.

III

Having concluded that an adversary proceeding is necessary before some of the relief requested by Deutsche Bank can be considered, the question resolves itself to how to deal with the matter. There are at least three arrows in the court's quiver.

First, the court could entertain the stay relief motion as a simple stay relief motion and grant only the relief that may be granted in such a motion, leaving it to the movant to file a subsequent adversary proceeding if it desires the further relief. This could result in \$400 in filing fees (\$150 for the stay relief motion, plus \$250 for an adversary proceeding). While expedient because the adversary proceeding does not commonly ensue, it is the experience of this court that it does little to abate the nuisance of having to be careful to police that which

1 can and cannot be granted in a stay relief order.

2 Second, the court could deny the motion outright because it
3 seeks relief in a procedurally incorrect manner. This has the
4 disadvantage of forcing the additional expense of preparing
5 another motion and paying a total of \$300 in filing fees.

6 Third, the court can accept the procedurally incorrect
7 requests for relief at face value and, pursuant to its obligation
8 to construe the rules to secure the just, speedy, and inexpensive
9 determination of every case and proceeding, deem the contested
10 matter to be an adversary proceeding. Fed. R. Bankr. P. 1001.
11 This alternative has the advantage of honoring the movant's
12 desire to have the court entertain all requests for relief.
13 Moreover, since it merely involves the transformation of a filed
14 matter, the total filing fee will be the \$250 for a single
15 adversary proceeding.

16 The choice among the alternatives is within the discretion
17 of the court. In this instance, the court chooses the third
18 alternative. The way to prevent a stay relief motion from being
19 deemed an adversary proceeding is to omit from the motion every
20 request that exceeds the simple stay relief provisions of § 362.

21
22 CONCLUSION

23 Deutsche Bank has sought relief in its motion that can be
24 entertained only by way of adversary proceeding. The court
25 chooses to give equal dignity to all of the requests for relief.
26 In order to do so, an order will be issued deeming Deutsche
27

1 Bank's stay relief motion to be a complaint commencing an
2 adversary proceeding and clarifying that it has waived the effect
3 of § 362(e). The clerk shall assign an adversary proceeding
4 docket number. Deutsche Bank shall pay to the clerk the unpaid
5 \$100 balance of the \$250 filing fee. A scheduling order shall
6 issue, which shall require the filing of an amended complaint.

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8 Dated: January 23, 2009

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12 _____
13 UNITED STATES BANKRUPTCY JUDGE
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CERTIFICATE OF SERVICE

On the date indicated below, I served a true and correct copy(ies) of the attached document by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed and by depositing said envelope in the United States mail or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's Office.

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